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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 322.

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

VS.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA ET AL., *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM AND TO MOTION TO DISMISS.

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I.

Preliminary Statement.

The Motions to Dismiss filed by the appellees[1] in and of themselves point up the importance of the Federal questions involved in this appeal and which require resolution by this Court.

[1]Two Motions to Dismiss the Appeal have been filed: one by Phillips Petroleum Company and the other by the Oklahoma Corporation Commission and Certain Mineral Owners in Texas County, Oklahoma. Each of such Motions is filed as a single instrument in this case and the companion cases Nos. 320 and 321. We shall answer both Motions in this one Brief.

The appellees seek to brush aside the fact that the identical sales of residue gas by Phillips to Panhandle here involved have twice been held by this Court to be sales in interstate commerce—*Panhandle Eastern Pipe Line Company* v. *Calvert*, 347 U. S. 157, and *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U. S. 672—and that such sales occurred after production and gathering are complete.

The burden of appellees' arguments is that the Order in question does not fix the price of residue gas purchased and sold in interstate commerce, but rather that it is simply a regulation of production at the wellhead and accordingly within the permissive regulation sanctioned by this Court in *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 340 U. S. 179. The argument is based upon a specious predicate, contrary to the facts and the law, and should be rejected.

II.

The Order in Question As Applied to Panhandle's Purchase of Residue Gas from Phillips in the State of Texas Fixes the Price of Such Residue Gas, and the Case of Cities Service Gas Company v. Peerless Oil and Gas Company Has No Application.

In an effort to bring this case within the holding of *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, *supra*, appellees contend that the Order in question is simply a wellhead price Order and that it does not purport to fix the price of residue gas. Thus, in subdivision I of their Motion (pp. 2, 3) appellees, Commission and Certain Mineral Owners, state that the appeal is from a decision of the Supreme Court of Oklahoma:

> "fixing a minimum price for natural gas produced * * * at the wellhead * * * and if the gas is

> processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering the price for the residue gas must be sold to realize the prescribed wellhead price."

Similarly, the whole tenor of the argument of appellee Phillips is that the Order is a "regulation of production conditioned on what the producer must realize for the gas at or as related back to the wellhead" (p. 9) and "the regulation is of the production, not of the sale" (p. 10). This same theme recurs throughout the two Motions (Commission and Certain Mineral Owners, pp. 8, 10, 11, 22, 27; Phillips, pp. 2, 12, 13).

These assertions are contrary to the express wording of the Order itself and its necessary operation and effect as applied to the purchase of residue gas by Panhandle from Phillips in the State of Texas. The Order specifically directs:

> "If the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262¢ per thousand cubic feet."[2]

It is difficult to see how an order intended to fix a price for residue gas could be more clearly worded. Insofar as the operations of appellant are concerned there can be no question about the matter. Under its contract with Phillips, Panhandle is required to pay 4½¢ per thousand cubic feet for the residue gas purchased by it in the State of Texas, measured at a pressure base of 16.4 pounds per square inch absolute. Under the express wording of this Order Panhandle will be required to pay to Phillips 9.8262¢ per thousand cubic feet for the residue gas, measured at

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[2]Appellant's *Statement as to Jurisdiction*, "Appendix B," p. xxxiv.

a pressure base of 14.65 pounds per square inch absolute, a little more than twice as much as the parties agreed to by contract.

The Order is not in "exact accordance with" the Order which was involved in the *Cities Service Gas Company* case, as asserted by appellees. It is an entirely different Order. Nor is the question the same as that which was involved in the case of *Phillips Petroleum Company* v. *State of Oklahoma,* 340 U. S. 190, as is contended by appel-pellees. With respect to that case appellees, Commission and Certain Mineral Owners, state (pp. 11, 12):

> "Appellants now desire a ruling upon the same question in an appeal brought by the purchaser. The contracts involved are the same in each instance. The gas sold is the same in each instance."

It is surprising that any of the appellees would take such a position, but particularly is it surprising that Phillips would make such a contention, since Phillips did not argue the invalidity of the Order under the Commerce Clause in the *Phillips* case. In such case this Court specifically pointed out (340 U. S., at p. 192):

> "Appellant does not argue that the orders violate the Commerce Clause."

In the *Cities Service Gas Company* case this Court was concerned with the question as to the validity of the order there involved as applied to sales of raw gas at the wellhead *before* gathering and processing. As stated by the Oklahoma Supreme Court in that case:

> "The regulation is imposed *before* any operations of interstate commerce occur."

While it is true that the contracts involved in the *Phillips* case and the gas sold thereunder in each instance

are the same as here involved, the Court in the earlier case was concerned with an entirely different order, which fixed the price of raw gas only at the wellhead *before* gathering and processing, and not with an order which fixes the price of residue gas *after* gathering and processing are complete. And the question as to whether the order as applied to the gas contracts and sales of residue gas was invalid under the Commerce Clause was not argued by Phillips and was not considered by this Court. However, these same contracts and the same residue gas sales were involved in *Phillips* v. *Wisconsin* and *Panhandle Eastern Pipe Line Company* v. *Calvert*, both *supra*, and the Commerce Clause was raised in those cases, and in both cases it was held that such sales were in interstate commerce. Such sales are not, therefore, subject to regulation by the states.

In a further effort to avoid the holdings of this Court in *Phillips* v. *Wisconsin* and *Panhandle* v. *Calvert*, appellees argue that the Order applies to production and that it can be applied only to producers and not to purchasers of gas. So far as appellant is concerned the Order fixes the price which it must pay for residue gas purchased by it at the outlet of Phillips' gasoline plant in the State of Texas. If Panhandle fails to pay that price, it loses its supply of gas for interstate shipment to its interstate markets.

The operation and effect of the Order, therefore, is aimed at interstate commerce. Even if it be assumed, *arguendo*, that the Order was intended only to regulate the production of gas and was not intended to fix the minimum price for residue gas (which assumption would be patently incorrect), the Order would be invalid for the reason that, as stated by this Court in *Alpha Portland & Cement Company* v. *Massachusetts*, 268 U. S. 203, 218:

> "* * * a state may not burden interstate commerce * * * under the guise of regulating * * * intrastate business."

III.

The Extraterritorial Effect of the Order.

In its Proposition No. II Phillips contends that as applied to the purchase of residue gas by Panhandle from Phillips in the State of Texas the Order is not an unlawful attempt by the State of Oklahoma to exercise extraterritorial jurisdiction. The basis for Phillips' contention, again, is that the Order is a regulation of the producer and production of gas in Oklahoma and that while it may affect the sale of gas outside of the State, it is not a regulation thereof. Accordingly, Phillips asserts that this matter was also disposed of by the *Cities Service Gas Company* and *Phillips* cases. In this connection Phillips states (p. 13) that the State of Oklahoma has an interest in what a producer realizes for gas produced in Oklahoma, regardless where the gas may be sold. It then states:

> "If this were not true, a producer could set at naught the public policy of Oklahoma merely by taking the gas outside the State before selling it."

This assertion begs the question. However desirable it might be from the point of view of those who would fashion the public policy of Oklahoma, it is clear that Oklahoma cannot in the guise of conservation regulate sales occurring beyond its borders. Cf. *West* v. *Kansas Natural Gas Company*, 221 U. S. 229.

It is not true, as asserted by Phillips, that "the validity of the Oklahoma Minimum Price Orders on this score, although not expressly mentioned, was effectively decided in the *Cities Service* case and the case of *Phillips Petro-*

leum Co. v. *State of Oklahoma*" (p. 14). The question as to whether the Oklahoma Minimum Price Order could be applied extraterritorially to the sales of residue gas beyond the Oklahoma state line was not presented to, discussed, argued or decided in either of those cases. With respect to the *Phillips* case apparently the Phillips Petroleum Company was unwilling to expose that question to decision. Certainly the Oklahoma Corporation Commission did not consider that this question had been decided in those cases. (See the statements of Commission representatives appearing at pages 9 to 11 of Panhandle's Statement as to Jurisdiction.)

In this case for the first time the question has been raised as to *whether this specific Order may constitutionally be applied to sales of residue gas in the State of Texas.*

In addition to its contention that this phase of the case is concluded by the *Cities Service* and *Phillips* cases, Phillips refers to other decisions which have no application to the Order here involved. It refers to such cases as *American Manufacturing Company* v. *St. Louis*, 250 U. S. 459, and *Utah Power and Light Company* v. *Pfost*, 286 U. S. 165. These cases stand for the position that the manufacture of goods and the generation of electricity are activities essentially local in character and subject to regulation and taxation by the state, even though the manufactured goods or energy are later sold in interstate commerce.

Phillips also refers to a line of decisions of which *Nelson* v. *Sears Roebuck & Company*, 312 U. S. 359, and *International Harvester Co.* v. *Evatt*, 329 U. S. 416, are examples, where the courts upheld taxes levied by states on the privilege of doing business in such states, in which the taxes were computed on the basis of the sales of goods manufactured in the state or activities actually within the

state. None of these cases has any application for the reason that the regulation here imposed is not a regulation upon activities which take place within the State of Oklahoma, but rather is an attempt to fix the minimum price of one of the constituent elements of raw gas which is processed and sold in the State of Texas.

A truly analogous situation was involved in *Baldwin v. Seelig*, 294 U. S. 511, where the State of New York had attempted to prevent the sale within that State of milk purchased in Vermont unless the price paid to milk producers in Vermont met the minimum price set by the New York law. In holding that the attempt by the State of New York to exercise such extraterritorial jurisdiction was invalid, the court, speaking through Mr. Justice Cardozo, stated:

> "New York has no power to project its legislation into Vermont by regulating the price to be paid in that State for milk acquired there" (294 U. S., at page 521).

IV.

Due Process and Contract Clauses.

Significantly, none of the appellees discusses the fact that the effect of the Order is to discriminate in favor of producers who operate gasoline extraction plants, such as Phillips, guaranteeing to them a profit from the operation of those plants; that the Order fixes the price of only one of the constituent elements of raw gas, namely residue gas, and does not apply to the other constituent elements thereof; that the only evidence to support the price of residue gas is the negative evidence as to the average price of the natural gasoline extracted from the raw gas as related to the cost of gathering and extraction in the past.

Appellees, Commission and Certain Mineral Owners, attempt to answer appellant's contentions in these respects

by asserting a conclusion to the effect that contracts are subject to the valid exercise of police power and that the Oklahoma Statutes upon which the Order is based were in existence at the time of the execution of the gas purchase contract between Panhandle and Phillips, and "that the right to conduct a business or to pursue a calling may be conditioned" (p. 24). This is a strange justification for the validity of the Order. The purchase of the residue gas by Panhandle from Phillips and its delivery take place in the State of Texas. With respect to that purchase and delivery Panhandle is not in any sense doing business in the State of Oklahoma.

Appellee Phillips attempts to answer these contentions by the cavalier assertion that all of such questions were considered and decided in the *Cities Service* and *Phillips* cases. None of these questions was involved in either of those cases. They were not considered, nor decided.

It is submitted that substantial and important questions concerning the due process and contract clauses are raised in this appeal; by ignoring such questions appellees cannot make them less so.

CONCLUSION.

Appellees' attempted interpretation and justification of the Oklahoma Commission's Order as applied to the sales of residue gas by Phillips to Panhandle in the State of Texas simply point up the area of conflict between state and Federal regulation of sales of residue gas in interstate commerce, and the importance of the Federal questions involved. Whatever may have been the theory upon which the Oklahoma Commission proceeded, it is clear that insofar as Panhandle is concerned the Order in question does fix the minimum price for the residue gas purchased by it

from Phillips in the State of Texas. Such sale of residue gas by Phillips to Panhandle in the State of Texas is in interstate commerce and beyond the power of the State of Oklahoma to regulate. No amount of interpretation or discussion can explain away that salient fact. Moreover, substantial questions relating to the due process and contract clauses of the Federal Constitution are raised by this appeal, and they are not answered in appellees' Motions.

Appellees' Motions should be denied.

Respectfully submitted,

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No. 320. MICHIGAN-WISCONSIN PIPE LINE CO. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL.; and

No. 322. PANHANDLE EASTERN PIPE LINE CO. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Appeals from the Supreme Court of Oklahoma. *Per Curiam:* Judgments reversed. *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U. S. 44. MR. JUSTICE HARLAN took no part in the consideration or decision of these cases. *Jack T. Conn, D. H. Culton, Coleman Hayes* and *Arthur R. Seder, Jr.* for appellant in No. 320. *Edward H. Lange* and *Mark H. Adams* for appellant in No. 322. *Mac Q. Williamson,* Attorney General of Oklahoma, for the Corporation Commission of Oklahoma; *T. Murray Robinson* and *Leon Shipp* for certain mineral owners in Texas County, Oklahoma; and *Rayburn L. Foster, Harry D. Turner, R. M. Williams, Kenneth Heady* and *Cecil C. Hamilton* for the Phillips Petroleum Co., appellees. Reported below: 272 P. 2d 425.